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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

BARBARA A. BALEJKO AND CASS BALEJKO,
PETITIONERS,

v.

MILTON HOSPITAL, INC. AND ANNELLA BROWN,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Whether the prior decisions of this Court together with the plain wording of Fed.R.Civ.P. 52(a) require a district judge trying a civil ation without a jury to find the facts specially and state separately his conclusions of law before a final judgment can properly enter?

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners, Barbara A. Balejko and Cass Balejko, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 3, 1982.

Opinion Below.

The decision of the United States Court of Appeals for the First Circuit, originally published at 685 F.2d 420, 422 (1982), appears in the Appendix hereto (App. 3A). The *per curiam* opinion justifying that decision appears in the Appendix hereto (App. 4a). The memorandum, order and judgment of the Court of Appeals, dated August 3, 1982, affirming the judgment of the District Court appears in the Appendix hereto (App. 5a). The order and judgment of the United States District Court for the District of Massachusetts is reproduced in the Appendix hereto (App. 1a) as well as the District Judge's denial of the Balejkos' motion for a new trial (App. 2a).

Jurisdiction.

The final judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the district court was entered on August 3, 1982, in response to the Balejkos' motion for reconsideration (App. 5a). This petition for writ of certiorari was filed within 90 days of that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Constitutional Provisions and Federal Rule of Civil Procedure Involved.

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

Federal Rules of Civil Procedure 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . .

Statement of the Case.

This is a civil action brought by the petitioners Barbara A. Balejko and Cass Balejko ("the Balejkos") in the United States District Court for the District of Massachusetts against the respondents Milton Hospital, Inc. ("the hospital") and Annella Brown ("the doctor") seeking damages against the hospital for negligent misrepresentation and the doctor for malpractice arising from a surgical operation to remove one of Mrs. Balejko's ovaries. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the matter in controversy exceeded $10,000, exclusive of interest and costs, and was a suit between citizens of different states, the Balejkos being residents of Florida and the respondents being persons who conduct business and reside in Massachusetts. In their complaint, the Balejkos specifically allege that the doctor failed to remove the ovary as promised and fraudulently concealed that fact from them. In addition, it was alleged that the hospital negligently maintained its records to represent the fact that the ovary had been removed when, in fact, it had not. Damages for consequential injuries and loss of consortium were claimed.

After pretrial discovery among the parties was concluded, the matter came on for trial on October 14, 1980, in the United States District Court for the District of Massachusetts

before Tauro, J. Upon the request of the Balejkos that the trial be one without a jury, the district judge responded:

> What I will tell you in this case is that I will not hear — this is a medical malpractice case, not a case involving constitutional issues or anything like that — I will not hear it jury-waived unless the parties agree that all I have to do is to call it like a jury calls it. In other words, at the conclusion of the case I will find for the plaintiff or the defendant. If I find for the plaintiff, I will award damages and without an opinion.
>
> If it is going to require an opinion, then we will have a jury trial. . . . In other words, all you are going to get from me is the same thing you get from a jury: Plaintiff — Defendant.

(Tr. 10/14/80 at 1-3.) The parties thereupon agreed to the procedure described by the trial judge.

At the cloase of all the evidence and before final arguments to the court, counsel for the Balejkos requested permission to present to the court requests for rulings of law. The trial judge refused permission to counsel to file same indicating to him that by waiving a jury in the first instance, the Balejkos had waived the right to file such requests.

On October 6, 1981, Judge Tauro issued an "Order" which stated that he was "not persuaded by the evidence that there was any negligence or misrepresentation on the part of either" the hospital or the doctor (App. 1a). He accordingly found for the respondents on all counts (App. 1a). A judgment consistent with this finding was thereupon entered (App. 1a). The Balejkos' subsequent motion for a new trial was denied (App. 2a). The Balejkos' appeal followed.

On June 24, 1982, the United States Court of Appeals for the First Circuit affirmed the judgment entered below rendering a decision without a published opinion. 685 F.2d 420, 422 (1982) (App. 3a). In the unpublished *per curiam* opinion issued the same day, the court of appeals *inter alia* rejected the Balejkos' argument that, regardless of their waiver of a jury trial, they were entitled to written findings of fact and rulings of law by the trial judge. It reasoned that:

> at the time [the Balejkos] waived their right to a jury trial both parties agreed on the record to try the case as if to a jury, with the court as the fact finder. [They] cannot now renege on their agreement.

(App. 4a.) The court of appeals then characterized the appeal as frivolous and awarded double costs to the respondents (App. 4a).

The Balejkos then moved pursuant to Fed.R.App.P. 40(a) for a reconsideration of the court of appeals' ruling (App. 5a). In response, the court, on August 3, 1982, issued a memorandum and order which while denying the motion substituted new language for the last two paragraphs of its original opinion (App. 5a-6a). This new language found no abuse of discretion by the district judge in refusing to receive written requests for rulings; and the court did not think that compliance with Rule 52(a) was necessary in this case because a complete understanding of the issues could be had from a review of the record on appeal (App. 5a-6a).[1] The judgment of the district court was accordingly affirmed (App. 6a).

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[1] The record on appeal consisted of the docket entries, the pleadings, certain discovery material, seventy-one pages of trial transcripts and the trial court's finding for the defendants.

The Balejkos have duly filed this petition for writ of certiorari within ninety days of the entry of this latter judgment. Said petition is timely because its filing comes within ninety days of the appellate court's disposition of Balejkos' motion for reconsideration. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 445-446 (1974). *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965). *United States* v. *Healey*, 376 U.S. 75, 77-78, 80 (1964). Compare *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 212-213 (1952).

Reasons for Granting the Writ.

I. The Decision Below Conflicts with the Decisions of This Court Defining the Mandatory Duty of the District Judge Trying a Civil Action Without a Jury to Find the Facts Specially and to State Separately His Conclusions of Law.

In *Interstate Circuit* v. *U.S.*, 304 U.S. 55, 56-57 (1938), this Court clearly established the mandatory duty of a district judge (under then Equity Rule 70½) trying a civil matter without a jury to find the facts specially and to state separately his conclusions of law thereon. *Id.* Subsequent decisions by this Court in *Kelley* v. *Everglades District*, 319 U.S. 415, 420-422 (1943) and *Commissioner* v. *Duberstein*, 363 U.S. 278, 292-293 (1960) further reinforced the affirmative and obligatory nature of Rule 52(a)'s language.

This clear expression by the Court has not gone unheeded by the federal courts of appeals. Every such court that has specifically addressed Rule 52(a) requirements has characterized them as mandatory in every action tried upon facts without a jury. *United States* v. *Rohm & Haas Company*, 500 F.2d 167,

177 (5th Cir. 1974). *Berguido* v. *Eastern Air Lines, Incorporated*, 369 F.2d 874, 877 (3rd Cir. 1966). *Dearborn Nat. Casualty Co.* v. *Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947). *Bach* v. *Friden Calculating Mach. Co.*, 148 F.2d 407, 411 (1945). 9 Wright & Miller, *Federal Practice & Procedure*, §§ 2574 at 690; 2577 at 697. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 31 (1940). See also *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U.S. 603, 608-609 (1899) (a rule of court has the force of law and is binding upon the court).

The purposes of Rule 52(a)'s requirement in a non-jury case are (1) to aid the appellate court by affording it a clear understanding of the basis for the trial court's decision; (2) to make definite just what the civil action decided for purposes of applying *res judicata* and estoppel principles in subsequent actions; and (3) to evoke care on the part of the trial judge in ascertaining the facts. *Featherstone* v. *Barash*, 345 F.2d 246, 249-251 (10th Cir. 1965). 5A Moore, Federal Practice, ¶ 52.06[1-2] (2d ed. 1979). A trial judge who has formulated and articulated his findings of fact and conclusions of law as part of his decision making process has thus satisfied himself that he has dealt fully and properly with all of the issues in the case *before* he decides it. In the absence of such a process, there is no certainty that a full and fair consideration of all the evidence and issues has been provided by the nisi privs court. Moreover, without adequate findings or conclusions the reviewing tribunal is unable to determine whether the decision reached by the lower court follows as a matter of law from all the evidence adduced and whether any of the "facts" relied upon by the trial judge in making a decision have any substantial support in the evidence. The requirement of Rule 52(a) of express findings and separately stated conclusions is "thus far from a technicality [but] [o]n the contrary, it is to insure against Star Chamber methods, to make certain that justice

shall be ascertained accordingly to facts and law. . . ." *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 68 App. D.C. 282, 287, 96 F.2d 554, 559 (1938). For this reason, these provisions of Rule 52(a) cannot be waived and any agreement between the parties that the District Judge need not enter findings of fact or conclusions of law is therefore completely ineffective. *Berguido, supra* at 877. *In re G.W. Giannini, Inc.*, 90 F.2d 445, 447-448 (2d Cir. 1937). *United States* v. *One Assortment of 25 Firearms*, 483 F.Supp. 16, 18-19 (E.D. Tenn. 1980). See also *In re Scrap Disposal, Inc.*, 8 B.C.D. 504, 505; 15 B.R. 296, 297 (9th Cir. Bankruptcy App. 1981).

Here the trial judge obtained a waiver from the parties of their jury trial rights and indicated that whichever way he ruled he would not issue an "opinion." He then proceeded to hear testimony and consider the documentary evidence adduced by the parties. At the conclusion of the trial, the court refused to consider the Balejkos' requests for rulings of law citing the earlier agreement to waive a jury trial. Instead of complying with Rule 52(a)'s mandate, the District Judge then issued a conclusory one-page order stating that he was not persuaded by the evidence that there was any negligence or misrepresentation by either respondent (App. 1a). On appeal, the district court's omissions were initially ratified by the court of appeals in view of the jury trial waiver (App. 4a). Upon reconsideration, however, the appellate court amended its decision (App. 5a-6a). It found no abuse of discretion in the trial court's refusal to consider the Balejkos' requests for rulings of law; and even though it conceded that Rule 52(a)'s mandate could not be waived by the parties, it refused to remand the matter for compliance therewith because "a complete understanding of the issues" was possible from the record on appeal (App. 6a).

But such a procedure is at odds with the prior decisions of this Court holding that Rule 52(a)'s mandate must be followed in all civil non-jury trials in the federal system (with certain limitations not present here). Moreover, when an appellate court has embarked on a *de novo* review of evidence in order to justify a judgment entered below (rather than remand the case for findings and conclusions), the evidence has been for the most part documentary or the facts have been largely undisputed. See, e.g., *King* v. *C.I.R.*, 458 F.2d 245 (6th Cir. 1972); *Sbicca-Del Mac, Inc.* v. *Milius Shoe Co.*, 145 F.2d 389 (8th Cir. 1944). Even the First Circuit Court of Appeals has been careful to limit its role in extracting findings of fact from the record to cases where the parties have stipulated to the facts, *Boston & Maine Corp.* v. *First Nat. Bank of Boston*, 618 F.2d 137, 142-143 (1st Cir. 1980), or where the record was otherwise free from dispute. *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526 (1st Cir. 1957). But where as here there are disputed questions of fact surrounding the liability of the respondents which, in turn, depended on the credibility of the testimonial evidence and the different inferences it generated, it was the professed duty of the court of appeals to remand the case to the district court for the purpose of making findings of fact and conclusions of law so that an intelligent and fair review could be had. *Kruger* v. *Purcell*, 300 F.2d 830, 831-832 (3rd Cir. 1962). *United Shoe Machinery Corp.* v. *Kamborian*, 160 F.2d 461 (1st Cir. 1947). In view of the Ninth Circuit's historical disdain for *de novo* appellate fact-finding, *Lundgren* v. *Freeman*, 307 F.2d 104, 113-114 (1962) (Duniway, J.), the language and approach of *Swanson* v. *Levy*, 509 F.2d 859, 861 (9th Cir. 1975), upon which the court of appeals here relied, should be either restricted to its own facts (involving the interpretation of an employment contract) or expressly overruled by this Court.

If the trial court had properly fulfilled its obligation here and made findings of fact, the reviewing court's only concern would have been with the legal conclusions to be drawn from the facts as found. *Osborn* v. *Sinclair Ref. Co.*, 286 F.2d 832 (4th Cir. 1960). In this sense, the Balejkos' requests for rulings of law were "a valuable aid to decision making," *In re Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970), and were therefore entitled to be filed. In addition, the trial court's express reference to its unwillingness to write "an opinion" was not sufficient to alert the Balejkos' counsel to the fact that no findings of fact or conclusions of law would eventually issue. A written opinion has never been regarded by this Court as tantamount to fulfilling Rule 52(a)'s requirements. *Interstate Circuit* v. *U.S.*, *supra*, 304 U.S. at 56-57. See also *United States* v. *Cornish*, 348 F.2d 175, 181 n.8 (6th Cir. 1965); *Plastino* v. *Mills*, 236 F.2d 32, 35 (9th Cir. 1956).

At no time did Judge Tauro indicate to counsel for any of the parties that he would depart from the obligations of Rule 52(a) or that he would not engage in the normal practice of accepting requests for rulings of law at the conclusion of the evidence and before argument. Implicit in this refusal to make findings or conclusions, to accept request for rulings of law or to alert the parties to this truncated procedure is a denial of due process of law guaranteed the Balejkos under the Fifth Amendment to the federal constitution. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Oregon*, 234 U.S. 385, 394 (1914). In the same sense, minimal due process requires that a decision maker confine itself to the record, to the legal evidence adduced at trial, to the applicable rules of law, and to a sound exercise of discretion. Without any written findings of fact or conclusions of law from the decision maker, there is no assurance that these due process requirements have been met. Rule 52(a) insures at least a modicum of the process that is due

all litigants. Judge Tauro's conclusory order does not meet that requirement; and the court of appeals' adoption of that order through its own *de novo* review of the evidence fails to provide a clear understanding of the ground upon which the trial court based its judgment. Indeed, a meaningful review was well-nigh impossible in the circumstances.

Because, then procedure employed by the district judge (as ratified by the court of appeals) conflicts with the prior decisions of this Court, a writ of certiorari should issue to review the decision below.

II. The Decision Below has Decided a Question of Federal Law which has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned such a Departure by the Trial Court, as to Call for an Exercise of This Court's Power of Supervision.

The district judge's order and the court of appeals' decision affirming the judgment below have effectively transformed the mandatory duty of Fed.R.Civ.P. 52(a) ("shall") into a discretionary function to be employed whenever either the trial or appellate court deems the issues involved insignificant enough to warrant something less than full compliance. But the Balejkos submit that the plain wording of Rule 52(a) does not admit to any such dilution on a case-by-case basis. If an erosion of Rule 52(a) is to take place, it should be done by this Court only after full briefing and argument by the parties and upon an exhaustive explication of the standards which would prompt such an important qualification to the Federal Rules of Civil Procedure.

This departure by the courts below from the accepted and usual course of judicial proceedings in the federal system,

therefore, justifies the issuance of a writ of certiorari by this Court to exercise its power of supervision to review the decision below.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit and, ultimately, to vacate said judgment and remand the cause to the District Court for the making of appropriate findings of facts and conclusions of law. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956). *Kelley* v. *Everglades District*, 319 U.S. 415, 422 (1943). *Mayo* v. *Canning Co.*, 309 U.S. 310, 319 (1940).

Respectfully submitted,

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